DATO' SERI ANWAR IBRAHIM & ANOR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CRIMINAL NOS: W-05-24 & 25-2000]
4 JULY 2000

CRIMINAL PROCEDURE: *Appeal - Decision of High Court - Decision not to allow defence to call a particular witness - Whether appealable to Court of Appeal - Whether a decision which would finally dispose of the rights of the parties - Whether decision not to call witness brought to an end the case for the defence - Courts of Judicature Act 1964, ss. 3 & 50(1)*

CRIMINAL PROCEDURE: *Accused - Calling of witness - Whether as of right - Whether a legal right - Whether entirely within discretion and control of the court - Whether it appears that witness is likely to be able to give material evidence - Form XXXI, 2nd Sch, Criminal Procedure Code - Evidence Act 1950, s. 136*

EVIDENCE: *Witness - Calling of witness by defence - Relevancy - Evidence Act 1950, s. 136 - Whether it appears that witness is likely to be able to give material evidence - Form XXXI, 2nd Sch, Criminal Procedure Code - Whether defence has legal right to call its witnesses - Whether entirely within discretion and control of the court*

This was an appeal from the decision of the trial judge refusing to allow the defendants to call Dr Mahathir Mohamad ('Dr Mahathir'), the Prime Minister of Malaysia, as a witness in their criminal trial. The trial judge had made a ruling under s. 136(1) of the Evidence Act 1950 that any evidence to be given by Dr Mahathir would be irrelevant and proceeded to set aside the subpoena served on him. Before the instant court, the prosecution raised the preliminary objection that the said ruling of the trial judge was not appealable having regard to s. 3 of the Courts of Judicature Act 1964 ('the CJA') and the previous decision of the instant court in *Saad Abas & Anor v. PP*.

Held:
Per Lamin Mohd Yunus PCA

[1a] The ruling of the trial judge not to allow the defendants to call Dr Mahathir as a witness was not one which would "finally dispose of the rights of the parties" within the meaning of ss. 3 and 50(1) of the CJA. Hence, it was not a "decision" an appeal from which the instant court would have jurisdiction to hear and determine.

[1b] A decision to call or not to call a witness cannot "finally dispose of the rights of the parties." The final disposal of rights relates to the final outcome of the whole case, *viz*, the right of the prosecution to prove a charge and the right of the defence to put up a defence. A decision to call or not to call a witness cannot bring to an end the case for the defence; it simply means there will or will not be further evidence for the defence, and such a decision, being one made in the course of a trial, has no element of finality because the defence has yet to be concluded.

[2a] The calling of witnesses in a criminal trial is not as of right for either the defence or the prosecution; it is only a right to apply to summon a witness to appear as provided for under the Criminal Procedure Code. The magistrate or trial judge will only summon a witness if it appears to him that that witness is likely to be able to give material evidence.

[2b] A party has a right to call a witness who is prepared to give material or relevant evidence, but no right whatsoever to call one who is not in possession of such evidence. The gathering of evidence is a process entirely within the discretion and control of the court.

[Preliminary objection upheld; appeal struck out; hearing in the High Court to resume.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan terhadap keputusan hakim bicara yang enggan membenarkan pihak defendan memanggil Dr Mahathir Mohamad ('Dr Mahathir'), perdana menteri Malaysia, sebagai saksi dalam perbicaraan kes jenayah mereka. Hakim bicara membuat satu keputusan di bawah s 136(1) Akta Keterangan 1950 bahawa sebarang keterangan yang akan diberikan oleh Dr Mahathir tidak mungkin relevan dan terus mengenepikan sepina yang telah diserahkan keatas Dr Mahathir. Semasa dalam mahkamah ini, pihak pendakwa membangkitkan satu bantahan awal yang keputusan tersebut tidak terpakai memandangkan s. 3 Akta Mahkamah Kehakiman 1964 dan keputusan terdahulu mahkamah ini dalam kes *Saad Abas & Anor v. PP*.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Keputusan hakim bicara tidak membenarkan pihak defendan memanggil Dr Mahathir sebagai seorang saksi bukanlah satu keputusan yang pada akhirnya akan menyelesaikan hak-hak pihak-pihak dalam ertikata s. 3 dan s. 50(1) Akta Mahkamah Kehakiman. Dari itu, ianya bukanlah satu keputusan yang mana mahkamah ini mempunyai bidangkuasa untuk mendengar dan memutuskannya.

[2] Keputusan untuk memanggil atau tidak seseorang saksi tidak boleh pada akhirnya menyelesaikan hak-hak pihak-pihak. Penyelesaian muktamad hak-hak berkait dengan keputusan akhir keseluruhan kes, iaitu, hak pendakwa untuk membuktikan pertuduhan dan hak defendan untuk membuat pembelaan. Keputusan untuk memanggil atau tidak seseorang saksi tidak dapat memberi kesudahan kes defendan; ia hanya bererti samada masih terdapat atau tidak keterangan selanjutnya untuk defendan, dan keputusan sedemikian yang dibuat semasa dalam perbicaraan, tidak mempunyai elemen kesudahan kerana pembelaan masih belum tamat.

[3] Pemanggilan saksi-saksi di dalam kes jenayah bukanlah satu hak yang mutlak bagi pihak defendan atau pendakwa; ianya hanyalah satu hak untuk memohon bagi mengarahkan saksi supaya hadir sebagaimana yang diperuntukkan dibawah Kanun Acara Jenayah. Majistret atau hakim bicara hanya akan mengarahkan seseorang saksi jika pada pandangannya saksi tersebut mungkin dapat memberi keterangan yang material.

[4] Sesuatu pihak berhak memanggil seseorang saksi yang bersedia untuk memberi keterangan yang material atau relevan, tetapi tiada sebarang hak untuk memanggil seseorang yang tidak mempunyai keterangan yang sedemikian. Pengumpulan keterangan adalah satu proses yang secara keseluruhannya adalah bergantung kepada budibicara dan kawalan mahkamah.

[Bantahan awal disahkan; rayuan ditolak; pembicaraan di Mahkamah Tinggi disambung.]

Case(s) referred to:
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(1), (2)
Criminal Procedure Code, s. 34
Evidence Act 1950, s. 136

For the 1st appellant - Karpal Singh (Aris Rizal Christopher Fernando, Gurbachan Singh & Sankara N Nair with him); M/s SN Nair & Partners
For the 2nd appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Mohtar Abdullah (Abdul Gani Patail, Azahar Mohamad, Tun Abdul Majid Tun Hamzah, Nordin Hassan & Shamsul Sulaiman with him)

[Appeal from High Court, Kuala Lumpur; Criminal Trial Nos: 45-51-98 & 45-26-99]

Reported by Alex KC Lee

JUDGMENT

Lamin Mohd Yunus PCA:

This is an appeal against the decision of the learned judge below for refusing to allow the defence to call the Rt. Hon'ble the Prime Minister, Dr. Mahathir Mohamad as a witness. The learned judge ruled *inter alia* that under s. 136 of the Evidence Act no useful purpose would be served to call the Rt. Hon'ble the Prime Minister to testify as his evidence would not be relevant. Having so ruled, the subpoena served on Dr. Mahathir Mohamad was therefore set aside. The central point of this appeal was on the question of relevancy and the application of s. 136 generally. Before the hearing of the appeal proper, the learned Attorney-General gave notice that he would be making a preliminary objection and his objection would be that the decision of the learned judge below was not appealable and the appeal should therefore be struck out. In other words the issue is whether the said decision would come within the meaning of the word "decision" as defined in s. 3 of the Courts of Judicature Act 1964 as amended by the Amendment Act A1031 of 1998. He submitted that if it did then he would pray for the appeal to be struck out and the case be remitted to the High Court with the direction to the learned judge that the hearing of the case be continued forthwith. We answered in the affirmative. We now give our reasons.

By virtue of sub-s. (1) of s. 50 of the Courts of Judicature Act 1964 this court "shall have jurisdiction to hear and determine any appeal against any decision made by the High Court –" and the word "decision" is as defined under s. 3 of the Act as amended in 1998 and it reads:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

The definition of the word "decision" clearly "does not include any ruling made in the course of the trial or hearing of any cause or matter which does not finally dispose of the rights of the parties." The learned Attorney-

General submitted that the ruling by the learned judge below was not a final decision as it did not finally dispose of the rights of parties. He also submitted that the calling of a witness by a party is not a legal right. In a criminal case, it is not the right of the prosecution nor is it the right of the defence to call any witness. The main thrust of Mr. Karpal Singh's contention on the other hand is that the calling of a witness is as of right and for the accused it is a fundamental right. He however qualified it in that it would be subject to the question of relevancy.

The issue to be decided here in our view is "is the ruling not to allow to call a witness is one made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties."

One thing was clear and it was that the ruling was one made in the course of a trial as it was still at the stage of the defence. The decision to call or not to call a witness cannot relate or cannot have the effect to "finally dispose of the rights of the parties." The final disposal of rights relates to the final outcome of the whole case meaning that the right of the prosecution to prove a charge and the right of the defence to put up its defence. The decision to call or not to call a witness cannot bring to an end the case for the defence. In *Saad bin Abas and Anor v. PP* [1998] 4 CLJ 575, on appeal, both the accused were ordered by the High Court to enter their defence before the learned magistrate below. Instead of complying with the order, they filed a motion for leave to appeal before us under s. 50(2) of the Courts of Judicature Act 1964. We said that there must be an element of finality in respect of the order to enter their defence before there can be an appeal. When a court orders an accused to enter his defence, it is a ruling made in the course of a trial and there is no finality as yet until the accused has put up his defence to its final conclusion followed by a decision on the whole case and it is that decision which is appealable. Similarly in the present case, to call or not to call a witness simply means whether there will be or there will be no further evidence for the defence and such a ruling is a ruling in the course of a trial which has no element of finality because the defence case has yet to be concluded.

Our discussion on "the rights of the parties" has no concern with the right of a person to be called as a witness nor the right of a person to call a witness. Of course there is no such thing as a person who is a prospective witness having a right to be called. If at all it is a right of a party to call his witness. Mr. Karpal Singh prefers to call it a fundamental right. But he conceded that it is subject to the question of relevancy. Section 136 of the Evidence Act 1950 is in point. It reads:

136. Court to decide as to admissibility of evidence.

(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

The very title of the section does not admit any doubt that it is for the court to decide on the question of relevancy before the evidence can be admitted. In a criminal case the process to compel the appearance of a person in court is by the issuance of a summons as regulated under Chapter V of the Criminal Procedure Code commencing with s. 34. Of course for the summons to issue there must be an application by the prosecutor if the evidence is to support the case for the prosecution and by the defence if it is to support the case for the defence. By way of illustration the form of a summons is as provided in Form XXXI in the second schedule of the Criminal Procedure Code. For ease of reference we reproduce Form XXXI below:

XXXI – SUMMONS TO A WITNESS

To ... of ...

Whereas complaint has been made before me that ... of ... has (*or* is suspected to have) committed the offence of *(state the office concisely, with time and place)* and it appears to me that you are likely to be able to give material evidence respecting the matter of such complaint:

You are hereby summoned to appear before the Magistrate's Court at ... on the ...day of ...next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that if you shall, without just excuse, neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court, this ... day of ... 19 ...

(Seal) ... Magistrate

If we may repeat the relevant parts of the Form thus:

Whereas complaint has been made before me that ... and it appears to me that you are likely to be able to give material evidence respecting the matters of such complaint:

You are hereby summoned to appear before the Magistrate's Court at ...

It is for the court to decide the meaning of "it appears" and "likely to be able to give **material** evidence ..."

Strictly speaking the summons will only issue if "it appears" to the magistrate that the witness is likely to be able to give "material evidence": We repeat "material evidence". Who is to decide whether the evidence is "material" or "not". It must be the trial judge or magistrate. (Note: The format in respect of a summons to compel the attendance of a witness to testify in a criminal trial in the High Court is the same). So in the context of legal process it appears that it is not a matter of "right" of any party to call a witness. Rather it is only a right to apply for a summons to be issued. In practice, a party intending to call his witness will submit to the magistrate or registrar as the case may be a list of named persons whom he believes will be able to assist his case with full particulars to enable service, and summonses will then issue.

In law a party cannot be denied of the benefit of a witness who is prepared to give material or relevant evidence. He has a right to call such a witness and therefore a summons will only issue to such a person. Hence the wording of Form XXXI. He has no right legal or otherwise to call any person not in possession of such evidence. So in the final analysis it is the court that decides and has control in the matter of calling witnesses in a criminal case so that only material witnesses will be summoned. The process as provided in the Criminal Procedure Code and s. 136 of the Evidence Act are means to control the gathering of evidence so that only material and relevant evidence are admitted. So any ruling pertaining to the gathering of evidence in a trial cannot have the element of finality.

For the above reasons we therefore made the order as we did.